

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-1312**

DONOHUE CONSTRUCTION CO., INC.,
Petitioner,

v.

MONTGOMERY COUNTY COUNCIL, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WARREN K. KAPLAN
ROY NIEDERMAYER
1801 K Street, N.W.
Suite 1100K
Washington, D.C. 20006
202-833-3700

Attorneys for Petitioner

(i)

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PETITION FOR A WRIT OF CERTIORARI
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Warren K. Kaplan and Roy Niedermayer, on behalf of Donohue Construction Company, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case insofar as it reversed the judgment for petitioner entered by the district court.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a) is not yet officially reported. The district court did not render a reported opinion but gave an unpublished

opinion (App. B, *infra*, pp. 16a-29a),¹ with its judgment (App. C, *infra*, pp. 30a-31a).

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did respondents take Donohoe's property without just compensation by an orchestrated use of their land-use planning powers, subdivision and zoning ordinances and acquisition processes directed at creating a public benefit at the sole expense of Donohoe?
2. Did the court of appeals exceed its appropriate scope of review by ignoring the factual findings of the district court that respondents (a) deprived Donohoe of any opportunity to utilize its property and (b) knowingly acted to prevent Donohoe from developing its property in order to facilitate later formal public acquisition?

¹ The district court rendered a reported opinion, 398 F. Supp. 21 (D. Md. 1975) on a preliminary issue on which petitioner does not seek review by this petition.

CONSTITUTIONAL PROVISIONS

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF- INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. amend. V.

AMENDMENT XIV. – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; ETC.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This is a suit against Montgomery County, Maryland (and its County Council), and The Maryland-National Capital Park and Planning Commission (and its Montgomery County branch, the Montgomery County Planning Board). These entities are responsible for planning the physical development of Montgomery County, Maryland. Alleging a taking of petitioner's property without just compensation under the fourteenth and fifth amendments of the Federal Constitution, the petitioner seeks payment of just compensation for the taking in exchange for a deed conveying a fee simple title to the respondents. After trial, the district court ordered the County to pay petitioner Four Hundred Sixty-One Thousand Forty-Two and 14/100 Dollars (\$461,042.14) in exchange for the unencumbered fee simple title; the court of appeals reversed and remanded.

1. Summary Statement of Facts.²

After acquiring the subject property ("Parcel One"), an undeveloped parcel on North Park Avenue, in the Friendship Heights area of Montgomery County, Maryland, petitioner Donohoe Construction Company, Inc. ("Donohoe") filed an application for a building permit in March, 1973, with complete plans for the construction of an office building.

² Donohoe's Summary statement of facts is followed by a more detailed statement of facts with specific references to the Joint Appendices, Volumes I-IV in the court of appeals.

Subsequent to Donohoe's assembly of Parcel One, the Montgomery County Planning Board (the "Board") of The Maryland-National Capital Park and Planning Commission (the "Commission") began public hearings on a Preliminary Sector Plan³ for the Central Business District of Friendship Heights, Maryland.⁴ As originally conceived, the Preliminary Sector Plan recommended downzoning Parcel One from C-2 to CBD-1 and permitting development of only 14,500 sq. ft. as office and rental space. It made no mention of public acquisition.

During and after public hearings on the Preliminary Sector Plan in February and March, the Board began considering public acquisition of Parcel One as a community facility in response to public recommendations. The Board and the Montgomery County Council (the "Council") were greatly concerned over Donohoe's potential development of Parcel One during the pendency of the Preliminary and Final Draft Sector Plans, they were uneasy over the inevitably increased costs and acquisition difficulties if Parcel One should be developed as proposed by Donohoe before final promulgation of the Sector Plan and implementation of the attendant downzoning provisions by amendment of the zoning map.

³ The Sector Plan Process employed here involved three stages. A "Preliminary Sector Plan" was followed by a reworked "Final Draft Sector Plan" before becoming the adopted "Sector Plan". In referring to the individual stages, this terminology has been used throughout Donohoe's petition.

⁴ The Sector Plan is a working guide for private development and public improvements precisely analyzing public facilities, amenities, service and safety needs and specifying plans for the location and general design of major public facilities, including parklands.

Beginning in April, 1973, the Board and the Council took positive steps to prevent private development during the interim period between the Final Draft Sector Plan and an adopted Sector Plan. Responding to a Council request in April, the Commission staff developed two coordinated ordinances designed to postpone action on subdivision plats and building permits in Friendship Heights by allowing administrative rejection of a subdivision plat or building permit for periods up to twelve months.

Concurrently with the development of these ordinances, the Commission and County employed administrative procedures in the building permit application process to delay review of Donohoe's plans and hinder issuance of a building permit. The Board took advantage of the administrative delay to engage in extensive discussion and review of the inclusion of Parcel One in the Draft Sector Plan as a park or recreation/community facility. Informed of Donohoe's pending building permit, the Board ordered and received a professional appraisal of Parcel One fixing its fair market value at Four Hundred Thousand Dollars (\$400,000.00). The Commission on various occasions expressed concern that commercial development would significantly increase the cost of acquisition.

The emerging desirability of acquisition of Parcel One for a community facility was repeatedly expressed in the Board's work sessions. Notwithstanding their concern over the high cost of acquisition and the Commission's staff's recommendation against acquisition, the Board amended the Preliminary Sector Plan by designating Parcel One for public acquisition and use in the Final Draft Sector Plan.

The Board gave no indication to Donohoe of its increasingly firm decision that Parcel One be acquired for public use. One day after the Board tentatively approved the Final

Draft Sector Plan calling for public acquisition, it considered and rejected Donohoe's subdivision plan.

In April, 1974, the County Executive (the "Executive") presented the Council with its recommended budget or Capital Improvement Program (the "C.I.P.") for the County for fiscal 1975-1980.⁵

In accordance with a prior directive received from the Council, the C.I.P. included a project for Parcel One as a recreation/community facility at an acquisition cost of Two Hundred Twenty-Nine Thousand Dollars (\$229,000.00). The Council, satisfied that this project adequately and correctly represented its intent for Parcel One, unanimously approved its inclusion in the C.I.P. on April 25, 1974, and on May 29, 1974, adopted and approved the revised C.I.P.

Consistent with the provision for public acquisition of Parcel One in the budget, the Council modified references to Parcel One in the Sector Plan by deleting all language about possible privately-developed retail use and substituting language showing acquisition as a recreation/community facility. The Council approved the Sector Plan with these changes on May 28, 1974, and one week later the Board and Commission adopted the Sector Plan with these modifications. Soon thereafter, the Council approved a Sectional Map Amendment to the Zoning Map, downzoning Parcel One to the much lower and less valuable zoning category

⁵ The C.I.P. is a six-year program containing the County's statement of its capital program objectives and development plans, recommendations for capital projects, estimated costs and source of revenue for the expenditures. Adoption of the C.I.P. by the Council constituted authorization for the County agencies to implement the projects and expend the funds for the achievement of the capital projects.

which the Council had selected with ultimate condemnation in mind.

The Map Amendment had no practical effect on the parcels surrounding Parcel One which had already been developed. It had a catastrophic effect on Parcel One. As a consequence of its designation in the Sector Plan and C.I.P., it became impossible for Donohoe either to obtain mortgage financing for construction or to sell the property to other developers. Since July, 1974, Donohoe has sustained a net monthly deficit on Parcel One of Three Thousand Six Hundred Dollars (\$3,600.00) per month without any hope of recouping these losses through development.

2. Detailed Statement of Facts.

By January 31, 1973, Donohoe had acquired Parcel One at a cost of Three Hundred Eighty-Six Thousand Eight Hundred Seven and 75/100 Dollars (\$386,807.75). (J. App. 294).⁶ At the time of Donohoe's purchase, Parcel One was zoned C-2 (App. 1234, Stip. 95), recorded on subdivision plats filed among the land records of Montgomery County, Maryland (J. App. 1219, Stip. 1), and had existing sewer connections and service being utilized by the two single-family dwellings located thereon.

Parcel One (.35 acres) is dwarfed both in size and in intensity of development by surrounding parcels. To the west is a 2.51 acre parcel containing a 525-unit highrise, apartment building (The Irene) (J. App. 574-75); to the south is a 1.34 acre parcel on which is located a 291-unit apartment

⁶ "J. App." refers to the Joint Appendices filed in the court of appeals.

building (Bradley House) (J. App. 575); and to the east is constructed a 309-unit building (Park Tower North) (J. App. 575) on 1.05 acres of land. Abutting this last property to the east is a 353-unit apartment complex (The Elizabeth) (J. App. 575) on 1.48 acres of land.

Upon acquisition of Parcel One, Donohoe immediately completed preparation of all surveys, engineering work and architectural plans necessary for the construction of a fourteen (14) story office building on the Parcel. (J. App. 267). On March 16, 1973, Donohoe filed its building permit application (J. App. 498; 793), together with a full set of building plans and the required fee (J. App. 794) with the Montgomery County Department of Environmental Protection (the "Department"). (J. App. 1235, Stip. 103).

Subsequent to Donohoe's assemblage of Lots 1 and 2 comprising Parcel One, the Board began public hearings in February, 1973 on a Preliminary Sector Plan for the Central Business District of Friendship Heights, Maryland (the "CBD") (J. App. 1354), as an amendment to the Master Plan for the Bethesda-Chevy Chase Planning Area (the "Master Plan") (J. App. 1224). The Sector Plan is a working guide for both private development and public improvements in the CBD (J. App. 1348; 1396-7; 1445). It is developed by the Commission staff for adoption first by the Board, then by the Council sitting as the District Council,⁷ as a six-to-ten year plan for the CBD (J. App. 525). For the private developer, the Sector Plan more precisely locates proposed parks to be developed which were only generally

⁷ Montgomery County Code, §§ 85-56, *et seq.* (1972); also called the Bicounty District Laws, Article III, The Washington-Regional District Act.

designated on the Master Plan. (J. App. 569; 1348). For the County, the Sector Plan provides an analysis of the public facilities, amenities, service and safety needs of the CBD and specifies plans for the location and general design of these major public facilities (J. App. 1349), thereby acting as a guide for the County's Capital Improvements Program and public services programs. (J. App. 1351).

The Preliminary Sector Plan (J. App. 1353-67) recommended downzoning Parcel One from C-2 to CBD-1 and permitting development of only 15,500 square feet as office and retail space. (J. App. 1364). The Preliminary Sector Plan made no mention of public acquisition of Parcel One. (J. App. 570; 1364; 1366-67).

At the public hearings on February 7, 12, 26, 28 and March 3 (J. App. 1224, Stip. 30), numerous individuals and citizens groups from the Friendship Heights area recommended acquisition of Parcel One for public use as a park or recreation/community facility. (J. App. 1224, Stip. 32; 1398). In response to these public expressions, the Board undertook to study and develop the possibility of public acquisition of Parcel One and its use as a park or community facility. (J. App. 1447).

From the onset of its redrafting of the Preliminary Sector Plan, the Board and the Council knew of Donohoe's pending building permit. (J. App. 972). Both bodies were concerned about Donohoe's development of Parcel One (as well as other land development in Friendship Heights) before final promulgation of the Sector Plan and the implementation of its downzoning provisions by amendment of the zoning map. (J. App. 1399). In particular, the Board and Council were uneasy over increased costs and acquisition difficulties if Parcel One should be developed as proposed by Donohoe.

Beginning in April, the Board and the Council took positive steps to prevent private development during the interim period between the Final Draft Sector Plan and adoption of the final Sector Plan. Aware that undeveloped parcels in Friendship Heights were being assembled for uses more intensive than allowed in the Final Draft Sector Plan but consistent with the then-existing zoning, the Council in an April 12, 1973 meeting requested the Board to devise a means to delay development in Friendship Heights. (J. App. 830; 1072; 1077). The Board and Commission staff responded at the end of May by developing two coordinated proposed ordinances (J. App. 1080-83; 1084-87) designed to postpone action on subdivision plats and building permits. (J. App. 805, 830, 1079). These proposals ultimately were introduced in the Council on July 17, 1973 as Ordinances Nos. 7-55 (J. App. 886-87) and 7-56 (J. App. 845, 888-90). Ordinance No. 7-55 amended § 50-23 of the General Procedures for Submission of Subdivision Plans by permitting the Board to reject a proposed subdivision plan for an area within the boundaries of or in conflict with the Preliminary or Final Draft Sector Plan for up to twelve (12) months. Ordinance No. 7-56 added subsection (e) to § 59-9 of the Montgomery County Code requiring that no building permit be issued for a period of six (6) months if the application site lay within the boundaries of a pending application for zoning map amendment.

Concurrently with the foregoing, Donohoe's building permit application had been forwarded for comment to the Commission (J. App. 385), which responded by indicating that a subdivision plat was required. (J. App. 399, 797). Without prejudice to its position that this requirement was not applicable, since it was not subdividing its property, Donohoe filed a preliminary subdivision plan (the "Subdivision") on April 13, 1973. (J. App. 798-803). The Com-

mission's staff forwarded copies of Donohoe's Subdivision for comment to interested County and regional agencies (J. App. 795, 796, 807) as well as to the Friendship Heights Citizens Committee, the governing body of the villages of Friendship Heights and The Hills. (J. App. 498). On May 25, 1973, the Friendship Heights Citizens Committee responded to the Commission with a request for additional time to review the Subdivision (J. App. 503, 808), and immediately thereafter a thirty (30) day delay was granted to the Committee. (J. App. 503). While review of Donohoe's Subdivision was progressing, the Department referred Donohoe's building permit application to the Washington Suburban Sanitary Commission (the "Sanitary Commission") for review. On May 31, 1973, the Sanitary Commission reviewed the building permit application and deferred any action on Donohoe's request for sewer service. Later, on August 16, 1973, the State Department of Health and Mental Hygiene instituted a sewer moratorium in the Little Falls Drainage Basin. (J. App. 861).

While Donohoe's building permit and Subdivision lingered during the period April through June, 1973, the Board and its staff, with heightened awareness of the pendency of Donohoe's building permit application and the attendant delay (J. App. 972; 1448), engaged in extensive discussion and review of inclusion of Parcel One in the Draft Sector Plan as a park or recreational/community facility. On June 5, 1973, the Board discussed the possibility of using Parcel One for both open space and public facilities. (J. App. 972). Chairman Royce Hanson ("Hanson") informed the other Board members that Donohoe had applied for a building permit under the then-existing C-2 zoning, and stated that "as long as the land is in private hands" the Board could not determine what the land would be used for, but that "if the Commission buys, we will make proposals as to how

it may be used." (J. App. 972, 979). On June 12, 1973, the Board received a professional appraisal of Parcel One from an independent expert. (J. App. 982). The appraisal, which had been ordered earlier by the Board to ascertain Parcel One's potential cost of acquisition (J. App. 1420-21), fixed the fair market value of Parcel One at Four Hundred Thousand Dollars (\$400,000.00). (J. App. 989). In addition, the Commission's staff, at the direction of the Board, analyzed the need for parklands in the CBD (J. App. 814) and concluded in a memorandum of June 25, 1973, that Parcel One could provide such public service facilities "if commercial development did not occur prior to acquisition." (J. App. 815). The Board discussed this aspect of the matter and the fact that if commercial development occurred the cost of acquiring the land would be significantly increased. (J. App. 1398-99).

At the June 26 Final Draft Sector Plan work session, Chairman Hanson pointed out that Parcel One was "probably the most purchasable" of the several sites being discussed for possible parkland acquisition. (J. App. 821). The Board directed the staff to show in the Final Draft Sector Plan a preferred use for Parcel One as "a community center oriented towards the people who live largely in the apartment development in Friendship Heights", and to superimpose a symbol over Parcel One showing public use. (J. App. 821). On July 5, the Commission's Chief Park Planner, Myron Goldberg ("Goldberg"), conducted a walking tour of Parcel One for two members of the Board and finally, on July 11, 1973, Hanson mailed a "Dear Fellow Citizens" letter to area residents and others referring to Parcel One as a projected community facility or park. (J. App. 835-839; 1400).

The emerging consensus for acquisition of Parcel One for a park or community facility, as expressed in Board work sessions, was nevertheless tempered by the Board's concern with the high cost of acquisition of this parcel under the pre-existing zoning. (J. App. 844). In a July 9, 1973 "confidential memorandum" to Hanson (J. App. 831), the Chief Park Planner recommended against acquiring Parcel One for park use because of its likely "excessive" cost (J. App. 832), adding "if this site is added as proposed parkland, the only justification in doing so would be to prevent further urban development on this site. Someone would have to make this statement publicly sooner or later." (J. App. 832).⁸ Despite the staff's view (J. App. 547; 849; 1450), the Board, at Chairman Hanson's suggestion, amended the Preliminary Sector Plan by directing the staff to designate Parcel One in the Final Draft Sector Plan for public acquisition and use as a recreation facility, with full development to be achieved after 1980 by the Commission building a community center. (J. App. 953; 1450; 1453).

During the Subdivision review process, the Board gave no indication to Donohoe of its contemplated use or acquisition of Parcel One. (J. App. 268; 1044A; 1401). On August 2, 1973, the day after the Board tentatively approved

⁸ In this same memorandum, Goldberg urged, in connection with another nearby proposed park site acquisition, that it was time to "threaten condemnation" in view of the owner's recalcitrance. (J. App. 832). The tactic of threatening condemnation as a device for bringing stubborn property owners into line with the Commission's ideas on land values was a standard technique utilized by the Commission on several occasions. (J. App. 1427-29). As Chairman Hanson euphemistically phrased it, the tactic of threatening condemnation was employed "to get the attention" of the land-owner and to assist in "reaching an agreement on a reasonable price". (J. App. 1404-06).

the Final Draft Sector Plan calling for public acquisition of Parcel One, the Board considered and rejected Donohoe's Subdivision. (J. App. 858).

With the Board's final approval on October 4, 1973, the Final Draft Sector Plan was ready for Council action. It now included a recommendation that Parcel One be acquired for public use. (J. App. 570).

After receipt of Donohoe's building permit application in March, 1973, the Department had refused to process the plans without prior approval from various County and regional agencies to which it had forwarded copies of the application, although actual Department review would have taken no more than four (4) weeks (J. App. 1441) and could have been completed by the end of April, 1973. (J. App. 398). Finally, after repeated requests by Donohoe, the Department processed Donohoe's permit application and by mid-November, 1973, Donohoe's plans were approved in all respects except air pollution licensing. (J. App. 400; 810; 884; 885). Subsequently, compliance with applicable air pollution requirements was satisfied by Donohoe and all required State and County air pollution permits were issued by December 14, 1973. (J. App. 400).

In December, 1973, the Council adopted Ordinances No. 7-55 and 7-56, ignoring an opinion from the County Attorney that no statutory authority existed for the passage of such ordinances. (J. App. 872). Immediately thereafter, on December 19, 1973, the Board filed its Sectional Map Amendment F-396 for Friendship Heights.

In January, 1974, the Executive presented to the Council his recommended Capital Improvements Program (the "C.I.P.")

for the County for fiscal 1975-1980. The C.I.P. is a six-year program containing (1) a statement of the County's capital program objectives and their relation to the County's long-range development plans, (2) recommendations for capital projects and their construction schedule, (3) an estimate of projected costs and (4) an indication of the source of revenue for the expenditures indicated. Adoption of the C.I.P. by the Council constituted authorization for the County agencies to implement the projects and expend funds for the achievement of capital projects contained therein. (J. App. 1435; 1458). Once the C.I.P. was approved, it became the objective of the County's Office of Planning and Capital Programming to acquire as many as possible of the parcels in the C.I.P. designated for acquisition. (J. App. 420; 439; 1459). This initial C.I.P. proposed in January contained no project on or for Parcel One. (J. App. 1237, Stip. 117).

On February 6, 7 and 9, 1974, the Council held its public hearings on the Final Draft Sector Plan. (J. App. 1226, Stip. 42). Once more, numerous individuals and citizens groups urged acquisition of Parcel One for public use as a part or recreation/community facility. Following the public hearings, the Council, the Board and their respective staffs conducted work sessions (J. App. 1226, Stip. 43) on the Final Draft Sector Plan on February 20 (J. App. 990), 27 (J. App. 999), March 6 (J. App. 1021), 26 (J. App. 1028) and April 4 (App. 1039). During these sessions, the Council explored acquisition of Parcel One (J. App. 998, 1004), and, through the interchange between the Board and the Council, the evolving concept of the use of Parcel One and its inclusion in the Sector Plan as a recreation/community facility

was confirmed. (J. App. 1016, 1053). Again, having been supplied with the Board's June 12, 1973 appraisal report (J. App. 1226, Stip. 44; 1415), there ensued extensive discussion of the high cost of acquisition of Parcel One. (J. App. 992; 1016). Indeed, the Council had actually decided to further downzone Parcel One to R-60, a lower zoning category than CBD-1. (J. App. 1390). On May 7, however, John Matthews, Director of Community Planning for the Commission, recommended that Parcel One be partially upgraded back to CBD-1, since it would be "inappropriate" to reduce Parcel One as low as R-60 "particularly when it is proposed for public acquisition". (J. App. 896). In apparent concurrence with Matthews' suggestion, Parcel One was restored to the CBD-1 category in the final Sector Plan. (J. App. 1286; 1291).

On April 5, 1974, the Council approved the acquisition of Parcel One for a recreation/community facility and directed the Executive to include such a project in the current C.I.P. under consideration for fiscal 1975-1980. (J. App. 893, 1227, Stip. 48). On April 15, 1974, the Executive, responsive to the direction of the Council, prepared and included in a revised C.I.P. a project description form ("PDF 1239B") for Parcel One, Friendship Heights, providing for acquisition of the Parcel by the County for use as a recreation/community facility at an acquisition cost of Two Hundred Twenty-Nine Thousand Dollars (\$229,000.00). (J. App. 1063). On April 25, 1974, the Council satisfied itself that PDF No. 1239B adequately and correctly represented its intent on the subject of Parcel One and unanimously approved its inclusion in the C.I.P. (J. App. 1065). On May 29, 1974, by Resolution No. 7-1744, the Council adopted and approved the revised C.I.P. (J. App. 1227, Stip. 51). Consistent with the C.I.P. revision, the Council modified

references to Parcel One in the Final Draft Sector Plan to conform it to the projected use after acquisition (J. App. 573), by deletion of all references to privately developed retail use for Parcel One (J. App. 573) and substitution of language showing acquisition as a recreation/community facility. (J. App. 1286; 1291; 1295-96).

On May 28, 1974, the Council approved the Sector Plan by Resolution No. 7-1736. (J. App. 1328-33). On June 6, 1974, the Board and Commission, by their own Resolutions, Nos. 74-22 and 74-17 (J. App. 1334) respectively, adopted the Sector Plan for the Friendship Heights Central Business District together with the modifications and revisions set forth in County Council Resolution No. 7-1736.

Soon after, on June 13, 1974, Bill No. 20-72 became effective, thereafter requiring Donohoe to notify prospective purchasers of Parcel One's status in the applicable Master Plans prior to execution of a contract of sale. (J. App. 1112; 1336-38).

On July 16, the Council approved a Sectional Map Amendment downzoning Parcel One and otherwise conforming the Zoning Map with the Sector Plan. (J. App. 901-903). While the amendment purported to re-zone parcels in the CBD, it had no effect on the already developed parcels surrounding Parcel One. Among its neighbors, only Parcel One was truly affected. (J. App. 576).

For each fiscal year from 1975 through 1983, the project for Parcel One has been included in the approved C.I.P. of the County. (J. App. 420-21; 427; 1436-37). In the recommended C.I.P. for the fiscal years beginning 1977, the Executive had recommended transfer of this project from the General Government category directly to the Commission's budget. (J. App. 427; 1392; 1438).

As a consequence of the designation of Parcel One in the Sector Plan and C.I.P., it became economically impossible for Donohoe to obtain mortgage financing for any construction on Parcel One (J. App. 278), nor was there any market for its sale to other developers in view of its being scheduled for public acquisition as shown in the Sector Plan. (J. App. 279). From July 1, 1974 to January 31, 1976, Donohoe, after giving credit for a gross rental income of Seven Thousand and Nine Hundred Sixty-Two and 50/100 Dollars (\$7,962.50) (J. App. 296), sustained an out-of-pocket loss of Seventy-One Thousand Three Hundred Fifty-Four and 14/100 Dollars (\$71,354.14) (J. App. 296) as a consequence of the continued expenses of maintenance, taxes, insurance and interest on mortgages. Indeed, Donohoe is currently suffering a net monthly deficit on Parcel One, based on current rental and carrying costs, of Three Thousand Six Hundred Dollars (\$3,600.00) per month. (J. App. 297).

3. Proceedings Below.

In November, 1974, petitioner instituted this lawsuit in the United States District Court for the District of Maryland under the fourteenth and fifth amendments of the United States Constitution. The district court found that the respondents had singled out Donohoe's property in the exercise of their police powers, and undertaken steps, with conscious knowledge of the consequences, to prevent the development of Donohoe's property independent of the sewer moratorium restrictions in order to acquire Parcel One for a public use. The result was a denial of any use of the property to Donohoe and the creation of a public benefit at the sole expense of Donohoe.

Focusing solely on the actions of the respondents in the exercise (or failure to exercise) their condemnation powers, the court of appeals reversed and remanded. The court below based its holding that no taking had occurred upon its

failure to find unreasonable delay in the exercise of the County's condemnation powers.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions concerning whether a compensable taking has occurred when a local government acts in furtherance of its expressed goal of creating a public project as part of a comprehensive plan for community development and so interferes with property rights that it substantially destroys the value and use of the property. Although unique in its particular facts, the general situation that gave rise to this lawsuit is repeatedly faced by property owners as local governments have acted to rejuvenate decaying urban areas or control suburban sprawl: substantial interference with, and destruction of, a property's use and value by the exercise of comprehensive land use planning powers in concert with subdivision regulations, zoning statutes and acquisition procedures.

The rationale of the principle of *de facto* taking is that it bars "government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554 (1960), while "redistributing certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to be in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502, 89 L.Ed. 1101 (1945).

This principle applies fully in this case. Respondents sought to acquire Donohoe's property to create a community facility benefiting the residents of Montgomery County at the sole expense of Donohoe. Considered in their entirety,

the regulatory and acquisition activities of the County related to Parcel One, including the Sector Plan, ordinances and Capital Improvement Budget, were nothing less than a series of actions designed to acquire control over Parcel One for the enjoyment and use of the public pending formal action. Respondents' unequivocal intention to condemn and acquire Donohoe's property for public use was finally manifested by the inclusion of the property in an approved budget authorizing the expenditures of public funds for the acquisition. The intended result of these activities extinguished any possibility that Donohoe might either develop the property itself or market the property to any other developer. Any use that Donohoe might have made of the property was destroyed through the continuing, imminent threat of condemnation.

Several courts of appeals and the Court of Claims have held under circumstances analogous to the instant one that comprehensive activities creating a substantial interference with, or reduction in the value of, the property constituted a taking under the fifth and fourteenth amendments. *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977); *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct. Cl. 1970). Most recently, the Ninth Circuit has agreed with this analysis in *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), holding that direct and substantial interference which impairs a property's value gives rise to a constitutional taking.

The Fourth Circuit's conclusion is inconsistent with the standard utilized by other circuits. In its decision below, the court of appeals has shifted the inquiry away from an analysis of the nature and extent of respondents' interference

with the development or sale of Parcel One and has instead focused its inquiry on the duration of the government's failure to exercise its formal condemnation powers. The taking occurred when respondents' deliberate acts produced their substantive effect on Parcel One, yet the Fourth Circuit measured the taking by the one-dimensional yardstick of the delay in instituting formal proceedings. This analytical divergence among the circuits in *de facto* condemnation cases involving comprehensive land-use planning requires clarification by this Court.

2. Whatever the validity of the constitutional standard applied, the court of appeals transgressed the appropriate scope of appellate review. The district court found egregious abuses of the respondents' condemnation powers, knowingly perpetrated in furtherance of the acquisition process. Based upon these determinations, the court of appeals should have affirmed the district court's decision. Instead, the court of appeals' analysis disregarded these binding factual determinations of intentional abuse of eminent domain and thereby exceeded the limits of proper review. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 23 L. Ed.2d 129, 148 (1969); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 92 L.Ed. 746, 766 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN K. KAPLAN
ROY NIEDERMAYER
1801 K Street, N.W.
Suite 1100K
Washington, D.C. 20006
202-833-3700
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 76-1850

DONOHUE CONSTRUCTION COMPANY, INC.,
Appellee,

v.

MONTGOMERY COUNTY COUNCIL and
MONTGOMERY COUNTY, MARYLAND,
Appellants,

and

THE MARYLAND-NATIONAL CAPITAL PARK and
PLANNING COMMISSION; THE MONTGOMERY
COUNTY PLANNING BOARD OF THE MARYLAND-
NATIONAL CAPITAL PARK and
PLANNING COMMISSION,
Defendants.

NO. 76-1851

DONOHUE CONSTRUCTION COMPANY, INC.,
Appellee,

v.

THE MARYLAND-NATIONAL CAPITAL PARK
 and PLANNING COMMISSION;
 The MONTGOMERY COUNTY PLANNING BOARD
 of the MARYLAND-NATIONAL CAPITAL PARK
 and PLANNING COMMISSION,

Appellants,

and

MONTGOMERY COUNTY COUNCIL and
 MONTGOMERY COUNTY, MARYLAND,
Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
 JOSEPH H. YOUNG, DISTRICT JUDGE.

Argued October 5, 1977 Decided December 20, 1977

Before HAYNSWORTH, Chief Judge;
 WINTER and BUTZNER, Circuit Judges.

Charles S. Rand, Assistant County Attorney (Richard S. McKernon, County Attorney; Robert G. Tobin, Jr., Deputy County Attorney on brief) for Appellants in 76-1850; Gus Bauman (Barbara A. Sears, Sanford E. Wool and Durvasula S. Sastri on brief for Appellants in 76-1851; Roy Niedermayer (Warren K. Kaplan on brief) for Appellee in 76-1850 and 76-1851.

WINTER, Circuit Judge:

These appeals are from a decision of the district court holding that Montgomery County, Maryland (County) took the private property of Donohoe Construction Company, Inc. (Donohoe) without just compensation in violation of the fifth and fourteenth amendments to the Constitution, and entering judgment against County, Maryland-National Capital Park and Planning Commission, Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission and Montgomery County Council, all of which were defendants in the action instituted in the district court. The district court, finding that certain actions undertaken by defendants with regard to Donohoe's property constituted an implied or *de facto* taking, ordered County to pay Donohoe the sum of \$461,042.14 in exchange for an unencumbered fee simple title to the property. Because we agree with defendants that the facts as found by the district court are not sufficient to support a finding that a taking occurred, we reverse and direct entry of judgment for them.

I.

Since March 1973, Donohoe has been the record owner of a parcel of land, located in the Friendship Heights section of Montgomery County, Maryland. Prior to Donohoe's purchase of this property, the Montgomery County Council and the Maryland-National Capital Park and Planning Commission (Commission)¹ had approved and adopted a Master Plan for the Bethesda-Chevy Chase planning area of which the town of Friendship Heights is a part. In December 1972, before Donohoe's purchase was completed but during its negotiations for the property, the Montgomery County Planning Board (Board)² adopted a preliminary Sector Plan for the Central Business District of Friendship Heights as an amendment to the Bethesda-Chevy Chase Master Plan. The preliminary plan recommended that a portion of Friendship Heights, including the parcel subsequently purchased by Donohoe, be downzoned so as to limit commercial development.

¹ The Maryland-National Capital Park and Planning Commission is a state-created agency responsible for preparing and maintaining a master plan for the physical development of the Maryland-Washington Regional District, comprising parts of Montgomery and Prince George's Counties, Maryland. Its powers, duties and functions are set out in Md. Ann. Code of 1957, art. 66D.

² The Montgomery County Planning Board comprises those members of the Maryland-National Capital Park and Planning Commission appointed by the Montgomery County Council. Its primary responsibility is planning for the Montgomery County portion of the Maryland-Washington Regional District.

At the time of Donohoe's purchase of the Friendship Heights property, the property consisted of two lots, upon which were located single-family residences, and an abandoned portion of a public roadway. Donohoe's intent was to demolish the existing structures and construct in their place a fourteen-story office building. Such a building was permitted by the zoning regulations then in effect but would not be permitted if the property was downzoned in accordance with the Board's preliminary recommendation. On March 19, 1973, Donohoe filed a building permit application with the appropriate county agency. As required by law, copies of the application were forwarded to the Commission, the County Public Works Department and the Washington Suburban Sanitary Commission (WSSC)³ for review and comment. The Commission promptly informed the County, which in turn informed Donohoe, that Donohoe's application could not be acted upon until it filed with the Commission a preliminary subdivision plan as required by the Montgomery County Code.⁴ Donohoe complied with this requirement on April 13, 1973. In May 1973, WSSC advised both the Commission and Donohoe that WSSC would be unable to provide sewer service to Donohoe's proposed office building on account of the sewer moratorium then in effect

³ The Washington Suburban Sanitary Commission is a public authority charged with managing and operating public sewage facilities in the Washington Suburban Sanitary District of which Montgomery County is a part.

⁴ Section 50-20 of the Montgomery County Code provides that no building permit can issue unless the proposed "structure is to be located on a lot or parcel of land which is shown on a plat recorded in the plat books of the county. . . ." Since the building proposed in Donohoe's application cut across existing plat lines, the property had to be "resubdivided" before a permit could issue.

in Friendship Heights.⁵ On August 2, 1973, the Board, acting upon the Commission's recommendation, disapproved Donohoe's subdivision plan. Chief among the reasons given was the unavailability of adequate sewer service. With the disapproval of the subdivision plan, Donohoe was unable to pursue further the permit for construction of the planned office building.⁶

In October 1973, following public hearings, the Board adopted a Final Sector Plan for Friendship Heights. Included in this plan was a recommendation that Donohoe's property be acquired by the local taxing district for a community recreation center. In the alternative, the plan recommended that the property be downzoned as originally proposed. This plan, including the recommendation to acquire Donohoe's property, was approved by the Montgomery County Council in May 1974. At the same time, \$229,000 was budgeted in the County's Capital Improvements Program (CIP) for the purchase of Donohoe's property in fiscal year 1975.

In the meantime, in April 1974, Donohoe was informed that its building permit application was being rejected pending Council action on the zoning recommendations contained

⁵ This controversial moratorium, which has been in effect since 1972, is described in detail in *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369 (D. Md. 1975). The district court in *Smoke Rise* found the moratorium to be a valid exercise of the state's police power.

⁶ Donohoe challenged this action by the Commission and the Board in a Maryland equity court. The Chancellor subsequently upheld the Board's action in *One Park North Associates v. Maryland-National Capital Park and Planning Commission*, Equity No. 48320 (Circuit Court for Montgomery County 1976). Apparently, no appeal was taken.

in the Final Sector Plan.⁷ In July 1974, Donohoe's property was downzoned, thereby prohibiting construction of the building proposed by Donohoe.⁸ Less than four months later, on November 4, 1974, Donohoe filed suit in the United States District Court, alleging that the above-recited actions on the part of the County Council, the Commission and the Board constituted a taking without just compensation in violation of the fifth and fourteenth amendments to the Constitution.⁹ The district court, exercising jurisdiction pursuant to 28 U.S.C. §1331, agreed with the plaintiff and ordered the relief sought.¹⁰

II.

Before we reach the merits of this case, we must address two preliminary points raised by defendants, both of which go to the jurisdiction of the district court to hear this case.

⁷ This action was taken under authority granted in County Ordinance 7-56, enacted in December 1973.

⁸ Donohoe subsequently challenged the zoning amendment in the Circuit Court for Montgomery County, Maryland. The record is silent as to the current status of this suit.

⁹ The posture of the parties has not changed in the more than three years since the filing of this action. While funds for acquisition are still budgeted in County's CIP, County has taken no action to acquire the property. At oral argument, County attorneys cited "political reasons" for this delay.

¹⁰ The district court awarded plaintiff a fair market value of \$378,888.00 and an additional \$82,154.14 to compensate for the expense of holding the property since the date of taking.

First, defendants contend that the district court lacked federal question jurisdiction under 28 U.S.C. §1331. Their argument is that, since the facts alleged in appellee's complaint fall short of constituting a taking within the meaning of the fifth and fourteenth amendments, there is no federal question on which to ground jurisdiction. This argument was answered thirty years ago in *Bell v. Hood*, 327 U.S. 678 (1946). There the court held that, where a complainant raises allegations which may or may not state federal claim, a district court should take jurisdiction to decide the merits of the controversy so long as the questions raised are not frivolous on their face. Here, Donohoe's complaint raises a substantial question as to the limitations placed on the state condemnation and zoning powers by the fourteenth amendment. Consequently, under the doctrine of *Bell v. Hood*, the district court acted properly in assuming jurisdiction under 28 U.S.C. §1331.¹¹

Second, defendants contend that, even if 28 U.S.C. §1331 authorized federal jurisdiction, the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), requires that the district court abstain from exercising that jurisdiction. Fatal to defendants' argument, however, is the fact that there exist in the present case no potentially dispositive questions of state law. See 312 U.S. at 498-500. None of the parties has suggested that any interpretation of those Maryland statutes which purportedly authorized the actions of the County or the Commission would be dispositive of the litigation, nor was the district court asked to

¹¹ The Supreme Court recently reaffirmed the doctrine of *Bell v. Hood* in *Hagans v. Lavine*, 415 U.S. 528, 542 (1974).

find a taking within the meaning of the Maryland state constitution. The only issue raised was one of federal due process. It is obvious that, where no issue of state law exists, the federal constitutional issue cannot be avoided by "a definitive ruling on the state issue. . . ." 312 U.S. at 498. Hence, the *Pullman* doctrine is inapposite,¹² and the district court's decision not to abstain was clearly the correct one. See *Ballard Fish & Oyster Co. v. Glasser Construction Co.*, 424 F.2d 473 (4th Cir. 1970).

III.

On the merits of the present controversy, the district court found that:

When the facts of this case are scrutinized, it becomes apparent that only a finding of *de facto* taking can preserve the guarantees of the Fifth and Fourteenth Amendments. When all the actions of the defendants are viewed together, it is apparent that Donohoe has been denied any reasonable economic use of its property at the expense of a public benefit, the proposed acquisition of the land for a community/recreation center.

¹² This is not a case like *Askew v. Hargrave*, 401 U.S. 476 (1971), where the complainant, in challenging a new state law involving the financing of public education, asserted a federal equal protection claim in federal court and asserted his state claims in state court. The Supreme Court, looking with disfavor at this sort of bifurcation, ordered the district court to abstain. In the instant case, Donohoe's state court actions challenge as unauthorized two of the defendant's decisions. Other than arising out of the same factual nucleus, these actions are entirely distinct from the one at bar. Likewise, we find *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to be distinguishable from the instant case. There, the plaintiffs were raising federal due

(continued)

In so finding, the district court was particularly troubled by five separate actions on the part of the defendants:

1. The August 1973 denial of Donohoe's subdivision plan.
2. The October 1973 amendment to the Master Plan wherein it was recommended that Donohoe's parcel be either acquired or downzoned.
3. The April 1974 rejection of Donohoe's building permit application.
4. The May 1974 decision to acquire Donohoe's property at a future time together with the budgeting of the necessary funds.
5. The July 1974 zoning amendment downzoning Donohoe's property.

The district court was not prepared to say that any one of the above actions in itself constituted a taking. Indeed, it was of the opinion that, viewed singly, most did not constitute a taking. Nonetheless, the district court concluded that the cumulation of these actions was sufficiently abusive of Donohoe's property rights to constitute a *de facto* taking.¹³ We disagree.

¹² (continued) process challenges to very complex state regulatory schemes before such schemes had received any definitive interpretation from the state courts. Here, there is no such challenge. Rather than a broadside attack on an entire statutory scheme, this suit alleges merely an isolated abuse of state power.

¹³ While a taking normally occurs as a result of formal condemnation proceedings instituted by the acquiring governmental unit, it is well established that an unconstitutional taking can also be implied from a substantial and burdensome interference by the government with a private property owner's use of his property, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Ballard Fish & Oyster Co. v. Glasser Construction Co.*, *supra*. Whether a particular interference transgresses the limitation imposed by the fifth and fourteenth amendments is a ques-

(continued)

In our view, the district court erred in not giving controlling weight to the effect of the sewer moratorium on Donohoe's use of the Friendship Heights property. The essence of Donohoe's dispute with the County and the Commission is that they impermissibly interfered with its plans to proceed with construction of a fourteen-story building on the property. Specifically, Donohoe complains that the denial of the subdivision plan, the rejection of the building permit application and the amendment downzoning the property each contributed to the frustration of the proposed use of the property. In reality, however, none of these actions visited any perceptible harm upon Donohoe; for the fundamental impediment to Donohoe's construction plans was (and still is) the sewer moratorium imposed upon the Friendship Heights area by the State of Maryland. This impediment was clearly beyond the control of any of the parties to this litigation.¹⁴ The moratorium has already survived constitutional challenge, *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, *supra*, and we see no reason to reopen that issue in the context of the instant case. We, therefore, conclude that in making its determination that an unconstitutional taking occurred, the district court erred in giving weight to those actions by defendants adverse to Donohoe's interest in constructing an office building on the property and in failing to recognize the significance and impact of the state-imposed sewer moratorium.

¹³ (continued) tion to be resolved on the facts of each particular case. *Pennsylvania Coal Co. v. Mahon*, *supra*, at 413. However, for governmental interference with private property rights to constitute an implied or *de facto* taking, such interference must be so substantial as to "deprive the owner of all or most of his interest" in the property. *United States v. General Motors*, 323 U.S. 373, 378 (1945).

¹⁴ See *Board of Appeals of Montgomery County v. Marina Apts., Inc.*, 326 A.2d 734 (Md. 1974), in which the Maryland Court of Appeals held that responsibility for determining sewer availability lay exclusively with WSSC.

Once the impact of the sewer moratorium has been taken into account, it becomes clear that, to prevail on the taking issue, Donohoe must look exclusively to the actions of the defendants going to the public acquisition of the property.¹⁵ So viewed, the question for decision is that: has the County, through either action or inaction, so abused its condemnation powers as to constitute an implied or *de facto* taking in violation of the fifth and fourteenth amendments?

In urging us to affirm the decision of the district court, Donohoe places particular reliance on three cases which its claims are closely analogous to the one at bar: *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970); *Foster v. City of Detroit*, 254 F.S. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6 Cir. 1968). In each, it was concluded that an abuse of condemnation powers had occurred and in each the acquiring government was ordered to compensate the property owner forthwith. Each, however, is clearly distinguishable from the instant case in that in each there was exhibited a pattern of governmental abuse wholly absent here. In each, the "cloud of condemnation" has been handing over the property for years. Because of this "cloud", no private market for the property existed. Development was impossible either because no bank would take a mortgage or because the governmental unit itself prohibited development pending acquisition. Yet the government refused

¹⁵ While, in its opinion, the district court viewed appellants' actions as a totality, it is fair to conclude that it viewed those actions going to the acquisition of Donohoe's property as the most disturbing. In fact, by fixing the date of the taking at May 28, 1974, the date at which the decision was made to acquire the Donohoe property, the court at least implicitly suggested that this was the act that pushed the County beyond the limits imposed by due process.

to proceed with the condemnation. The property owner, holding a non-liquid, non-productive asset with no immediate prospects of compensation, finally sought federal judicial intervention to force the governmental unit to acquire the property.

The principle which emerges from these cases is that federal courts will not intervene in local condemnation proceedings absent strong and convincing evidence that the government has egregiously abused its condemnation powers. Against this standard, the facts of the instant case are not sufficiently compelling to warrant federal judicial intervention. Even if the County's decisions of May 1974, to acquire Donohoe's property and to budget funds therefor, rendered the property commercially useless to Donohoe, it cannot be said as a matter of law that the County's condemnation powers had been abused. Central to the cases cited to us by Donohoe is the notion that the acquiring governmental unit acted in an unreasonably dilatory manner.¹⁶ Certainly at the commencement of this suit just six months after the decision to acquire was made, it cannot be said that the County had been unreasonably dilatory in instituting condemnation proceedings. To conclude otherwise would, in our opinion, unreasonably burden the legitimate planning efforts of state and local governments.¹⁷

¹⁶ In *Benenson*, the "cloud of condemnation" hung over the property owners' heads for some ten years before suit was commenced; in *Foster*, twelve years.

¹⁷ Our reticence to intervene in what are important local functions is entirely consistent with emerging principles of federalism evident in such recent Supreme Court decisions as *National League of Cities v. Usery*, 426 U.S. 833 (1976); and *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973). It is also consistent with the traditional reluctance of the court to find that an exercise of local police or taxing power constitutes a taking within the meaning of the fifth and

in our opinion, unreasonably burden the legitimate planning efforts of state and local governments.¹⁷

This is not to say that defendants have acted in an exemplary manner throughout. While the County may not have been expected to acquire Donohoe's property by the time suit was filed, it has made no attempt during the three-year pendency of this suit either to institute condemnation proceedings or to remove the "cloud of condemnation."¹⁸ Of

¹⁷ (continued) fourteenth amendments. *See, e.g., Pittsburgh v. ALCO Parking Corp.*, 417 U.S. 369 (1974); *Goldblatt v. Hempstead*, *supra*; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁸ Defendants strenuously argue that federal relief is inappropriate in this case despite any acquisition delay because Donohoe had available an adequate statelaw remedy in the "tax-free reservation" statute. Montgomery County Code of 1972, §50-31. This statute authorizes the County to reserve land for public use (and thereby forestall private development) pending public acquisition for up to three years. During this three-year reservation period, the owner of record is immune from all local property taxation. The reservation and resultant immunity are apparently triggered by the developer's filing a preliminary subdivision plan in accordance with §50-20 of the Code. *See* footnote 4, *supra*. It is not clear from the record why Donohoe has not received the relief envisioned by §50-31. We can speculate that the inactive status of Donohoe's subdivision plan at the time of the acquisition decision may account for this failure. Perhaps if Donohoe had filed a new subdivision plan subsequent to the decision to acquire, the relief might have been forthcoming. On the other hand, it would seem inequitable to require this to be done when the actual development of the property was forestalled by the sewer moratorium. The question of the availability of the tax-exemption is a question more appropriately pursued in the state courts, and we express no view on it. Because we decide today in the defendants' favor, it is also unnecessary for us to determine, assuming that as a matter of state law the remedy provided by §50-31 was available to Donohoe, whether, as a matter of federal law, such remedy was adequate to mitigate the deleterious effects of the County's decision to acquire Donohoe's property.

course, defendants may have taken this firm stance against negotiating with Donohoe in order to preserve a final determination on the merits, such final determination being viewed as essential to future land use planning by the County and the Commission. But now that there has been a resolution on the merits, the County should move with dispatch either to institute formal condemnation proceedings or to rescind the decision to acquire the subject property, thereby leaving Donohoe free either to sell the property or to develop it within the limits imposed by the applicable zoning regulations and the sewer moratorium.

The judgment of the district court is reversed and the cause remanded with instructions to enter judgment for the defendants.

REVERSED AND REMANDED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONOHUE CONSTRUCTION COMPANY,
INC.

vs.

Civil No.
Y-74-1210

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION;
THE MONTGOMERY COUNTY PLAN-
NING BOARD OF THE MARYLAND-
NATIONAL CAPITAL PARK AND
PLANNING COMMISSION; MONTGO-
MERY COUNTY COUNCIL; and
MONTGOMERY COUNTY, MARYLAND

MEMORANDUM AND ORDER

Donohue Construction Company, Inc. (Donohue) brings this action against the Maryland-National Capital Park and Planning Commission (Commission), the Montgomery County Planning Board of the Commission (Board), the Montgomery County Council (Council), and Montgomery County, Maryland (County), seeking (1) a declaration that the defendants have taken the property of the plaintiff for public use without just compensation in violation of the Fourteenth Amendment; (2) a declaration of the date of such taking; and (3)

an award to plaintiff as just compensation for the taking. The Court's jurisdiction is based on 28 U.S.C. §1331. The findings herein shall constitute findings of facts and conclusions of law in accordance with Fed. R. Civ. P. 52(a), whether or not specifically set forth as such.

Donohue is the record owner of a parcel of land (Parcel One), located in Friendship Heights, Montgomery County, Maryland at 4625 North Park Avenue. Parcel One is composed of two lots, upon which exist single family residences, and an abandoned portion of Saratoga Avenue. To complete its purchase of Parcel One, Donohue contracted to purchase one of the lots on January 31, 1973, upon which settlement occurred on March 2, 1973. On March 29, 1973, Donohue filed a building permit application with the County Department of Environmental Protection, accompanied by plans for a fourteen-story office building. Such a building was permitted by the then existing zoning category, C-2.

After receipt of Donohue's application, the Department of Environmental Protection forwarded copies of the application to the Commission, the Board, the Washington Suburban Sanitary Commission (WSSC), and the Public Works Department of the County for review and comment. The Board responded on March 21, 1973, indicating that a subdivision plat of Parcel One had to be approved before a building permit could be issued. Donohue, informed of this requirement on March 27, 1973, filed with the Commission an "Application of Preliminary Subdivision Plan" on April 13, 1973. On April 23, 1974 Judson Beavers of the Department of Environmental Protection informed Donohue that the Department was withholding action on the building permit application pursuant to County Ordinance 7-56.* On

* Footnote indication of page 18a of text.

July 16, 1974 the zoning map was amended to down-zone Parcel One to CBD-1, prohibiting construction of the building proposed by Donohoe.

In October, 1970 the Council, sitting as the District Council, approved, and the Commission adopted, the Master Plan for the Bethesda-Chevy Chase Planning Area. In June, 1972 the Council began consideration of the zoning in the Central Business Districts (CBD) and the Transit Station Areas. On December 7, 1972 the Board approved a "Preliminary Sector Plan for Friendship Heights" as an amendment to the Bethesda-Chevy Chase Master Plan.

The Board then held public hearings on the plan and began work sessions to prepare a final draft Sector Plan for submission to the Council. At the first work session the Board requested an appraisal be made of certain parcels which had been recommended during the public hearings for acquisition for park use, including Parcel One. On October 4, 1973 the Board approved the Final Draft Sector Plan which included a recommendation that Parcel One be acquired by the local taxing district for a community/recreation center, and, if not, that it be zoned CBD-1.

The plan was forwarded to the Council, which, sitting as the District Council, held public hearings and then work sessions. At the February 27, 1974 work session a motion was adopted to show the purchase of Parcel One by the

* Ordinance 7-56 provides in pertinent part: "... applications for building permits shall be rejected if all or any part of said application lies within the boundaries of an application for an amendment to the zoning map. . . ." Additionally, the Ordinance provided that if action on the proposed zoning map amendment is still pending, "after passage of six (6) months from the date of the original submission of the building permit application, an application for a building permit rejected in accordance with the provisions of this subsection may be refiled . . . and shall not be rejected again under the provisions of this subsection."

County as a community/recreation center. The County Executive had suggested this proposal in a memorandum to the Council on February 25. The amendment deleted any reference to an alternative use of the property.

The Council, with the amendment included, approved the Final Draft Sector Plan on May 28, 1974. The Approved Sector Plan became effective when adopted by the Board on June 6, 1974 and the Commission on June 12, 1974.

On April 25, 1974 the Council also approved Project Description Form No. 1239B (PDF 1239B) for Project No. 751601 for inclusion in the recommended County Capital Improvements Program (C.I.P.) for fiscal years 1975-80. The C.I.P. set aside \$229,000 as the proposed acquisition cost of Parcel One during Fiscal Year (FY) 1975. This C.I.P. was adopted by the Council on May 28, 1974. However, Parcel One was not acquired during FY 1975 and Project No. 751601 was carried into the 1976-81 C.I.P.

On July 16, 1974 the Council, sitting as the District Council, granted Sectional Map Amendment F-947, which downzoned Parcel One to CBD-1 and otherwise conformed the zoning of the Zoning Map with the Approved Sector Plan.

These facts were stipulated to by the parties, but they disagree as to their consequences. Donohoe contends that these actions by the defendants, together with the enactment of Bi ll No. 20-72, which requires a seller of property to inform any prospective purchaser of his right to inspect the Master Plan, constitute a taking of Donohoe's property for a public use without just compensation. The defendants consider each individual action by the various agencies and assert that standing alone none constitutes a taking.

The necessary elements to establish an inverse condemnation are the same as in an eminent domain proceeding except that it is not pursuant to procedurally *de jure* initiatives. Nichols, Eminent Domain, §8.1[3](Cumm. Supp.). These are (1) a taking of (2) private property (3) without formal proceedings or just compensation (4) for a public use. Here the only disputed element is whether there has been a taking. This is not an easy question. The Supreme Court has stated, "There is no set formula to determine when regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). Whether the police power or the power of eminent domain is being used does not necessarily appear from the form in which the governmental body has acted. *Arastra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Calif. 1975). Several tests have been advanced to determine when a taking occurs, mainly: (1) physical invasion; (2) diminution of value; (3) balancing social gains against private losses; and (4) private harm/public benefit. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). None of these tests has been deemed sufficient to cover every factual situation and the case law suggests that each case must be decided on its individual facts.

The defendants have urged this Court to determine that "no taking arises under the fifth amendment unless the property has been rendered worthless or useless." *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369 (D. Md. 1975). However, Chief Judge Northrop not only used this diminution of value test, but also employed the balancing social gains against private losses and the private harm/public benefit tests. Under all three tests, Judge Northrop was able to conclude that, under the facts in *Smoke Rise, supra*, there had not been a taking.

Thus, it cannot be said that the worthless and useless test is the only test for a taking adopted by this Court.

Viewed individually, most of the actions by the defendants do not amount to a taking. The denial on August 2, 1973 of Donohoe's subdivision plan was not a taking of Parcel One. Although Donohoe argues that it was not required to submit a subdivision plan, this Court need not resolve that issue. The County required every applicant for a building permit to file a subdivision plan if the proposed building crossed existing plats. Further, a portion of Parcel One is an abandoned portion of Saratoga Avenue which has never been included in a subdivision plat. Under any test of a taking, the denial of the subdivision plan was not a taking.

The same is true of the denial of the building permit application. The application was not originally ruled on because no subdivision plan had been approved for Parcel One and, according to the County, sewer service was not available. The Department of Environmental Protection deferred action on the permit while an amendment to the zoning map was pending. When this amendment was adopted the proposed building could no longer be built.

The amendment to the Master Plan by the Sector Plan, even though it designated Parcel One for a community/recreation center, does not constitute a taking. It is bornbook law that the adoption of a master plan, or an amendment to it, does not constitute a taking. The master plan is a declaration of policy and generally has no legal effect. Haggman, *Urban Planning & Land Development Control Law*. See also, Williams, *American Land Planning Law*, §22.01.

The downzoning of Parcel One along with the other properties in the Friendship Heights CBD presents some difficulty. The Commission and the Board attempted to estab-

lish that the downzoning was a proper exercise of the police power and did not deny Donohoe all reasonable use of its property. The new zoning does allow several possible uses of the property. Thus, by itself, it does not cross the lines between regulation and taking. The Commission and the Board presented the testimony of Alexander Cunningham, a traffic engineer with the Commission, to establish that the property was downzoned to control future traffic problems in the area. Regulating traffic is a proper goal of the police power as it relates to the promotion of the public safety and health. However, Cunningham's testimony indicated that Parcel One was singled out in the effort to control the future flow of traffic through the entire area when restrictions on the use of other parcels, specifically Parcels 6 and 7, may have been more appropriate to accomplish the goals. Such action is not a proper exercise of the police power. The County cannot single out one property to control the flow of traffic through an entire area, especially when other properties are also available. Nevertheless, such action of itself did not amount to a taking of plaintiff's property.

The inclusion of the project for the acquisition of Parcel One in Fiscal Year (FY) 1975 as a community/recreation center in the C.I.P. comes as close as anything to a taking standing alone. The defendants argue that the preparation of the C.I.P. is an obligation imposed on the County by its Charter and that it is nothing more than an extremely preliminary step in a lengthy acquisition process. The testimony of Robert Lanham, the Director of the County Department of Community and Economic Development, indicates that the inclusion of a project in the C.I.P. is the first step in the acquisition process. The second step is the site selection process which was not necessary here. Thus, Parcel One had passed through two of the steps toward public

acquisition. James Giegerich testified that the purpose of the C.I.P. was to prepare a six-year capital expenditure program for all capital projects, and it was the basis upon which a financial plan for expenditures was made for the County. Appearance of a project in the approved C.I.P. constitutes authorization for that agency to spend funds for that project. However, there was also testimony at the trial that only fifty percent (50%) of all projects ever come to fruition and that inflation and the depressed market in municipal bonds could reduce that figure in the future. However, as will be evident, it is not necessary for this Court to determine that inclusion of a project in a C.I.P. constitutes a taking.

The issue presented here is a strange twist of the "planning blight" situation. Normally the problem of planning blight is created when a governmental body announces a plan to take certain property before instituting condemnation proceedings. Meanwhile, the property deteriorates as people move out and others are unwilling to move in. Parcel One is located near the successful Wisconsin Avenue shopping district and upper income residential properties. Although the area is not a source of urban blight, a similar problem is presented when the County indicated an intention to take the property, but has not filed condemnation proceedings.

In some cases the courts have found that due to governmental actions a *de jacto* taking has occurred before the governmental agency has initiated formal condemnation proceedings. See *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct. Cl. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Klopping v. City of Whittier*, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972);

Peacock v. County of Sacramento, 271 Cal. App. 3d 845, 77 Cal. Rptr. 391 (Ct. App. 1969). Several cases have held there was no *de facto* taking. See, e.g., *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974); *Simmons v. Wetherell*, 472 F.2d 509 (2d Cir.), cert. denied, 412 U.S. 940 (1973); *Selby Realty Co. v. City of Buena Ventura*, 10 Cal. 3d 110, 514 P.2d 111 (1973); *City of Buffalo v. J. W. Clement Co., Inc.*, 321 N.Y.S.2d 345, 269 N.E.2d 849 (1971). These cases can readily be distinguished from the facts under consideration, but each teaches us that it is necessary to weigh two competing interests in deciding whether a taking has occurred.

On the one hand, this Court is aware that a finding of a *de facto* taking could have a deleterious effect on land use planning by the County. See *Selby Realty Co. v. City of Buena Ventura*, *supra*. In *Clement* the New York Court of Appeals was concerned that a finding of a *de facto* taking would result in governmental agencies conducting their planning in secrecy. Also this Court must consider that a finding of a *de facto* taking reduces legislative control over the allocation of financial resources. See *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439 (1974). However, the Court must also concern itself with the provisions of the Constitution that prohibit the taking of private property for public use without just compensation. See *Klopping v. City of Whittier*, *supra*.

When the facts of this case are scrutinized, it becomes apparent that only a finding of *de facto* taking can preserve the guarantees of the Fifth and Fourteenth Amendments. When all the actions of the defendants are viewed together, it is apparent that Donohoe has been denied any reasonable economic use of its property at the expenses of a public

benefit, the proposed acquisition of the land for a community/recreation center. Currently Donohoe is renting the two single family residences for a total of \$415.00 a month. From July 1, 1974 to January 31, 1976 Donohoe suffered an operating loss of \$79,316.64. The current net monthly deficit is approximately \$3,600.00. Although the CBD-1 zoning permits over fifty different uses, Donohoe is unable to take advantage of any of these uses due to the cloud of future condemnation. Richard Donohoe, the president of the company, testified that he could not obtain a loan to develop the property because of the threat of condemnation. It should be noted that the 1975-80 C.I.P. budgeted \$229,000.00 for the proposed acquisition cost in fiscal year 1975. Carried forward into the 1976-81 C.I.P., the project was budgeted for fiscal year 1976. Thus, the cloud of condemnation is apparently an imminent threat, not a future one. It would not be feasible to formulate plans for the development of the property when the County has taken the initial steps to acquire the property within the year.

The actions of the defendants have deprived the plaintiff of any opportunity of developing Parcel One. The Planning Board desired to limit the development of land in the Friendship Heights CBD, and the citizens desired more open space and park land for their community. One such site proposed by these citizen groups was Parcel One. However, when Donohoe completed its purchase of Parcel One, it immediately undertook plans to build a fourteen-story office building on the site. When considering the acquisition of Parcel One, the Board knew of Donohoe's application for a building permit. In response to this application, the Board required that Donohoe submit a subdivision plan for Parcel One, which the Board would have to consider. On August 2, 1973, the Board denied approval of Donohoe's subdivision plan for failure to comply with the recently enacted

Adequate Public Facilities Ordinance. Two days after Donohoe had submitted its proposed subdivision plan, Royce Hansom, the chairman of the Board, requested the Council to give the Board tools to delay the approval of subdivision plans while an amendment to the Master Plan affecting that property is pending. On December 4, 1973 the Council enacted such an ordinance.

In a memorandum from the Chief of the Urban Design Division of the Commission to the Board, dated June 25, 1973, it was stated that Parcel One could provide open space or a community service facility if commercial development did not occur prior to the acquisition. On July 9, 1973 Myron Goldberg, Chief Park Planner for the Commission, in a memorandum to Chairman Hansom advised against the acquisition of Parcel One as the proposed acquisition price was excessive on a per square foot basis. In this memorandum Goldberg stated that the only justification for acquiring the land would be to prevent further urban development on the site. At the July 27, 1973 work session the Board, despite its staff recommendation against acquisition, instructed its staff to state in the text of the Sector Plan that the local community would purchase Parcel One.

This Court finds that the Board under the direction of its Chairman, knowing of the development plans for Parcel One, undertook steps to prevent that development to facilitate later acquisition for public use. The intention to acquire Parcel One was later finalized when the Council adopted the 1975-1980 C.I.P. on May 28, 1974, which included a project for the acquisition of Parcel One in FY 1975.

This case is very much unlike the *Smoke Rise* case. There Judge Northrop found that the sewer moratoria ordered by the Department of Health and Mental Hygiene of the State

of Maryland did not constitute a taking of private property without just compensation and that the sewer moratoria orders were a proper exercise of the police power, in that they amounted to a prevention of public harm, and not a promotion of a public gain. But under the facts of this case the defendants have undertaken a project to benefit the public, rather than to prevent harm to the public, and this project is being done at the expense of one entity, Donohoe.

In this case such a finding does not inhibit the planning activities of the County. The County, from the spring of 1973 to May 28, 1974 considered the acquisition of Parcel One. Public hearings and work sessions were held by the Board and the Council. The County did plan the acquisition of this parcel. The mere announcement that the County is considering the acquisition of private property is not a taking. However, the inclusion in the C.I.P. of the project for the acquisition of Parcel One converted any future plans into a present intention, considering the project was to be completed during FY 1975. A finding of a taking does take from the County Council some of its control over the expenditure of County funds. But this is the price the County must pay if it is going to compel a property owner to hold in abeyance any plans to develop his property, losing \$3,600.00 a month, while the County bides its time before going through with its stated intention to file condemnation proceedings.

There is a lack of any definitive standard as to what constitutes the date of the taking. That date has been described as the date of governmental commitment to the project. Rohan & Riskin, *Real Estate Transaction*, Vol. 3A, §14.02[4]. The crucial act was the adoption of the C.I.P. on May 28, 1974 by the Council which becomes the date of the taking.

In considering appropriate relief, the Court was concerned that on the ground of federal-state comity, it lacked the authority to order any of the defendants to acquire fee simple title in Parcel One. However, the only fair and sensible relief is to award to the plaintiff the fair market value of Parcel One on May 28, 1974, the date of the taking, plus any other losses suffered as a result of the actions of the defendants, and to order the plaintiff to convey fee title to the County, concurrently with payment therefor. Thus, the County can go forward with its plan for a community/recreation center and the plaintiff will be fully compensated for its property. The only other possible relief would be an award of damages, but to reach an equitable result this Court would have to speculate on the final outcome of future condemnation proceedings. Such guesswork could result in an unjust enrichment for one side. The County might obtain the property at a bargain basement price, or the plaintiff may make an unwarranted profit. Thus, the defendants will be ordered to compensate the plaintiff for the taking and the plaintiff will be ordered to convey title to the County. *See Arastra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Calif. 1975). *Cf. Drakes Bay Land Co. v. United States*, 424 F.2d 574, 191 Ct. Cl. 389 (1970).

The proper measure of damages is the fair market value of the property on the date of the taking, plus expenses incurred since that date, less any amounts that accrued to the plaintiff from his possession of the property. Both the plaintiff and the defendants submitted expert testimony of an appraiser as to the fair market value of the property during May-July of 1974. Oakley Thorne testified for the plaintiff that the fair market value of the property, assuming that sewer service was not available and not including the architectural costs for the proposed building, was \$457,800.00.

Defendants' expert testified that the fair market value of the property in May, 1974 was \$379,300.00. Donohoe purchased Parcel One for a total of \$378,888.00. The uncontradicted testimony of Donohoe's treasurer was that Donohoe had suffered a net loss on Parcel One from July 1, 1974 to January 31, 1976 of \$71,354.14, and that the current monthly deficit was approximately \$3,600.00. Considering the testimony of the expert witnesses, this Court finds that the fair market value of the property on the date of the taking was \$378,888.00. In addition, the plaintiff is entitled to \$82,154.14 for its expenses from the date of taking to the date of this order for a total of \$461,042.14.

Since it was eventually determined that the County would be the acquiring governmental body, the County will be ordered to pay the plaintiff \$461,042.14, concurrently with conveyance to it of unencumbered and clear fee simple title.

Accordingly, it is this 9th day of June, 1976, by the United States District Court for the District of Maryland, ORDERED:

1. That Montgomery County, Maryland took the private property of Donohoe Construction Company, Inc., without just compensation on May 28, 1974;
2. That Montgomery County, Maryland pay to Donohoe Construction Company the sum of \$461,042.14 as just compensation for the taking of the property, and costs; and
3. That Donohoe Construction Company convey to Montgomery County, Maryland unencumbered fee simple title to Parcel One, concurrently with payment therefor.

/s/ JOSEPH H. YOUNG
Joseph H. Young
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * *

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Joseph H. Young filed June 4, 1976 in the above entitled case, it is:

ORDERED AND ADJUDGED:

1. That Montgomery County, Maryland took the private property of Donohoe Construction Company, Inc., without just compensation on May 28, 1974.
2. That Montgomery County, Maryland pay to Donohoe Construction Company the sum of \$461,042.14 as just compensation for the taking of the property, and costs.
3. That Donohoe Construction Company convey to Montgomery County, Maryland unencumbered fee simple title to Parcel One, concurrently with payment therefor.
4. That Judgment be, and the same is, hereby entered in favor of plaintiff against defendant Montgomery County, Maryland in the amount of Four Hundred Sixty-One Thousand, Forty-Two Dollars and Fourteen Cents (\$461,042.14), and Costs.

5. That Judgment be, and the same is, hereby entered in favor of plaintiff against defendants Maryland-National Capital Park and Planning Commission, the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission and the Montgomery County Council.

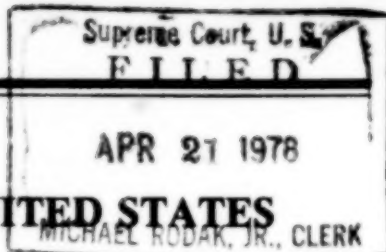
Dated at Baltimore, Maryland this 9th day of June, 1976.

APPROVED this 9th day of PAUL R. SCHLITZ, Clerk
June, 1976:

<u>/s/ JOSEPH H. YOUNG</u>	By: <u>s/s R. BRUCE McELHONE</u>
Joseph H. Young	R. Bruce McLehone
United States District Judge	Deputy Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977



No. 77-1312

DONOHUE CONSTRUCTION CO., INC., *Petitioner*

v.

MONTGOMERY COUNTY COUNCIL, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

DURVASULA S. SASTRI
GUS BAUMAN
SANFORD E. WOOL
8787 GEORGIA AVENUE
SILVER SPRING, MARYLAND 20907
301-565-7374

*Attorneys for Respondent
The Maryland-National Capital Park
and Planning Commission*

RICHARD S. MCKERNON
ROBERT G. TOBIN, JR.
CHARLES S. RAND
MONTGOMERY COUNTY OFFICE BUILDING
ROCKVILLE, MARYLAND 20850
301-279-1346

*Attorneys for Respondents
Montgomery County and
Montgomery County Council*

April 1978

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit on behalf of respondents Montgomery County, Montgomery County Council, The Maryland-National Capital Park and Planning Commission, and Montgomery County Planning Board is not yet officially reported (Pet. App. 1a-15a). The opinion of the United States District Court for the District of Maryland is not reported (Pet. App. 16a-31a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in pertinent part: ". . . nor shall any State deprive any person of . . . property, without due process of law"

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in its inability to construct an office tower because of a sewer moratorium imposed by a governmental body not party to this litigation.
2. Whether petitioner, by commencing this litigation approximately six months after the County published plans to purchase petitioner's property, had been so damaged by the time lapse as to be denied due process of law.

STATEMENT

Petitioner's Statement of Facts is virtually identical to its Statement in its Brief to the Court of Appeals. It begins, again, with a "Summary" Statement with no reference to the record, permitting inferences to be subtly and early made where no facts exist. Because the distortion of certain salient facts by Petitioner is so shocking, some clarifications must be made.

1. Petitioner states that subsequent to its "assembly of Parcel One," public hearings began on the Preliminary Sector Plan for Friendship Heights, Maryland, which "recommended downzoning Parcel One from C-2 to CBD-1" and "permitting development of only 14,500 square feet" (Pet. 5; true figure is 15,500 square feet, as stated at Pet. 10). First, Parcel One was never assembled as a lot on a subdivision plat for recording and possible subsequent development by Petitioner. Parcel One is comprised instead of three lots — one for each of two houses and one for Saratoga Avenue abandoned. Indeed, Saratoga Avenue abandoned has never been platted. (App. 1219). Secondly, Parcel One was never singled out for proposed downzoning, which is an inference running as a thread throughout Petitioner's Statement. Most of the land in Friendship Heights was likewise zoned C-2 and was likewise recommended for CBD-1 zoning by the Sector Plan. (App. 1243 at p. 48-49). Finally, all three lots of Parcel One together comprise only 15,246 square feet. (App. 1243 at p. 44).

2. Petitioner, citing to nothing in the record, states that "the Commission and County employed administrative procedures in the building permit application process to delay review of Donohoe's plans and hinder issuance of a building permit." (Pet. 6). Nothing could be further from the truth. Petitioner applied for a permit from the County on March 19, 1973. (App. 1235; Stip. 103). The application was forwarded to various agencies, including the Park and Planning Commission¹ and the Washington

¹The Maryland-National Capital Park and Planning Commission and Montgomery County Planning Board, one of its two constituent bodies, was created by Chapter 448 of the Laws of Maryland of 1927; its enabling authority is found in Article 66D of the Annotated Code of Maryland, 1977 Cumulative Supplement. It is an independent instrument of the State, not an agency of either Montgomery or Prince George's County nor a part of any other bi-county regional commission, charged with planning, parks and subdivision functions within most of Montgomery and Prince George's Counties. *Prince George's County v. M-NCPPC*, 269 Md. 202, 306 A.2d 223 (1973); *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 96 A.2d 353 (1953).

Suburban Sanitary Commission (WSSC)². (App. 1236; Stip. 104). On March 21, the Commission advised the County that, with three lots underlying the proposed building, resubdivision would be required to create one lot. (App. 1236, 796; Stip. 106). The County so advised Petitioner on March 27. (App. 1237, 797; Stip. 107). On April 13, Petitioner applied to the Commission for resubdivision, and the application was forwarded appropriately to various agencies. (App. 1228; Stip 54, 55). On May 24 and 31, the WSSC responded to the application, stating that no sewer capacity was available for the fourteen-story building proposed, and further, that it (WSSC) had imposed a sewer moratorium on the Little Falls drainage basin, which included the subject property. (App. 1228, 806; Stip 59). Petitioner *did not appeal* the WSSC decision. (App. 356). Thus, by May, the WSSC was solely in control of the application, and neither Commission subdivision approval nor County building permit approval could legally issue once the WSSC made its independent negative determination. (App. 274, 352-356, 391, 408). As the Court of Appeals stated, this sewer impediment was clearly beyond the control of all the parties to this litigation (Pet. App. 11a), given the exclusive sewer responsibility residing in the WSSC, an autonomous state agency. *Board of Appeals of Montgomery County v. Marina Apartments, Inc.*, 272 Md. 691, 326 A.2d 734 (1974); Chapter 115 of the Laws of Maryland, 1971, as amended.

3. Petitioner claims, again citing to nothing in the record, that "Informed of Donohoe's pending building permit, the Board

²The WSSC was created by Chapter 122 of the Laws of Maryland of 1918. An independent public body corporate created by the State, it exercises the public water and sewer authority within Montgomery and Prince George's Counties, and has its own authority to sue or be sued, to exercise the power of eminent domain, and to derive its own funds from separate sources. It is not an agency or part of either County or of the Park and Planning Commission. *Board of Appeals of Montgomery County v. Marina Apartments*, 272 Md. 691, 326 A.2d 734 (1974); *Bowie v. WSSC*, 249 Md. 611, 241 A.2d 396 (1968); *Neuenschwander v. WSSC*, 187 Md. 67, 48 A.2d 593 (1946).

ordered and received a professional appraisal of Parcel One" (Pet. 6). There is absolutely no evidence that Petitioner's building permit application to the County somehow caused the Commission's Planning Board to order an appraisal of Petitioner's property. The record does establish that the Board ordered an appraisal for *planning* purposes of *five* sites in Friendship Heights, not just Parcel One as implied at Pet. 13. (App. 1224, no. 33; App. 1225, no. 35).

4. Petitioner claims that "One day after the Board tentatively approved the Final Draft Sector Plan calling for public acquisition, it considered and rejected Donohoe's subdivision plan." (Pet. 6-7). Aside from the legal argument that the law dictated denial of the proposed subdivision given the lack of sewer availability by the WSSC for the proposed development and the severe traffic constraints, the Draft Plan forwarded by the Board to the County Council recommended not only public acquisition of Parcel One by the *local taxing village* but also *private development* in the alternative. (App. 168-69, 1378, 1380, 1384).

5. Petitioner claims that the comprehensive rezoning of Friendship Heights "had no practical effect on the parcels surrounding Parcel One," that "[a]mong its neighbors, only Parcel One was truly affected." (Pet. 8, 18). The entire Friendship Heights Central Business District comprises only 37.5 acres; on North Park Avenue alone, Parcels 4, 5, 6 and 7, as well as 1, were similarly undeveloped and similarly rezoned to the CBD-1 classification. (App. 1243 at 11, 42, 44, 48). The constant and unsupported implication by Petitioner of an intentional singling out of Parcel One defies everything in the record as well as the rationale for the Sector Plan and subsequent comprehensive rezoning of Friendship Heights, which were upheld by the Maryland Court of Appeals in *Montgomery County, et al. v. Woodward and Lothrop, Inc., et al.*, 376 A.2d 483 (1977).

6. Petitioner states that "As a consequence of [Parcel One's]

designation in the Sector Plan and C.I.P., it became impossible for Donohoe either to obtain mortgage financing for construction or to sell the property to other developers." (Pet. 8, 19). Nothing could be further from the facts. Richard Donohoe, president of Petitioner, testified that Donohoe never offered Parcel One for sale, never attempted to sell it, never attempted to mortgage it and was, in fact, generating rental income from the two properties comprising Parcel One. (App. 281-83). Indeed, Donohoe also testified that Petitioner bought Parcel One in two transactions at obviously C-2 zoning prices without knowing about or caring to investigate the already-released Preliminary Sector Plan, which proposed CBD-1 zoning for Parcel One and many other parcels (App. 279-80), even though Petitioner had been represented by counsel before the Planning Board and its Friendship Heights Citizens Advisory Committee prior to Petitioner's purchases of the Parcel One lots and prior to the Board's and Committee's promulgation of the Preliminary Plan. (App. 536-37, 954, 1220, 1223). The Constitution certainly does not obligate the government to underwrite such a speculative gamble taken by an "eyes-open" developer during a comprehensive planning process, particularly where that gamble includes the wearing of blinders to the WSSC and State-imposed sewer moratoria.

7. Petitioner explains that Parcel One "had existing sewer connections and service being utilized by the two single-family dwellings located thereon." (Pet. 8). It must be pointed out, however, that sewer *capacity* was *not* available under the terms of the existing moratoria, except to the extent of the existing flow (Parcel One was generating a sewage flow of 1,000 gallons per day, while the proposed office tower would generate a flow of 16,000 gallons per day). (App. 359, 760, 806).

8. Petitioner states that Parcel One is surrounded by large apartment buildings. (Pet. 8-9). Directly north of the parcel, however, lies public parkland and single-family residential homes. (App. 1243 at 42).

9. Petitioner states that "the Sanitary Commission [WSSC] reviewed the building permit application and deferred any action on Donohoe's request for sewer service." (Pet. 12). The word "deferred" is certainly the least accurate statement contained in WSSC's letter of May 31, 1973 to Petitioner, which letter stated tersely that the State moratorium of May 20, 1970 and WSSC moratorium #72-041 made it impossible to authorize sewage for Petitioner's projected flows until added *capacity* was gained through temporary or permanent treatment plants. (App. 1218). From May 31, 1973 until this suit was filed that WSSC determination remained unchanged. (App. 354). Moreover, the second State moratorium of August 16, 1973 further precluded authorization, and Petitioner never applied for or received an exception therefrom. (App. 861-65, 1237, 1241; Stip. 110, 138).

10. Petitioner asserts that "Finally, after repeated requests by Donohoe, the [County] Department [of Environmental Protection] processed Donohoe's permit application and by mid-November, 1973, Donohoe's plans were approved in all respects except air pollution licensing." (Pet. 15). This was hardly the case. On August 24, 1973, Donohoe's counsel wrote the County a letter acknowledging the County's administrative policy of not reviewing *structural* plans until WSSC sewage and Commission subdivision approvals had been obtained, further acknowledging that Donohoe lacked these approvals, but nonetheless requesting that the *structural* plans be reviewed while solutions to these problems were sought by Donohoe. (App. 868). The County granted this requested exception to its policy, reviewed the structural plans, and notified Donohoe's attorney of their near-approval on November 15. (App. 394-7, 885). Due to the continuing moratoria, Donohoe never solved the sewage and subdivision problems. And the County, which processed the structural plans out-of-turn at Donohoe's request, now stands accused of delaying and hindering, with the Commission, the processing of Donohoe's building permit! (Pet. 6).

11. Petitioner claims that "there ensued extensive discussion of the high cost of acquisition of Parcel One. (J. App. 992; 1016). Indeed, the Council had actually decided to further downzone Parcel One to R-60, a lower zoning category than CBD-1. (J. App. 1390)." (Pet. 17). Again, Petitioner through distortion of the truth seeks to create the impression of a major, calculated intent to bend a broad-based planning process to the parochial aim of blocking development of Parcel One under the C-2 zone. The record cited shows no "extensive discussion" on Parcel One but rather a brief, normal discussion as a part of many public worksessions on the Sector Plan, and the Council never decided at any time to rezone Parcel One to R-60, nor does that designation appear in any of the several drafts of the Sector Plan. (App. 580-83).

The tired litany of unsupported allegations and the blatant misrepresentations manifest in Petitioner's Statement of Facts typify the pattern of Petitioner's case from the start — to "bull it on through" the courts (App. 1194, in-house memorandum by Petitioner's president) by attempting to foster the belief that Petitioner was truly and constitutionally injured.

ARGUMENT

As the Court of Appeals stated, "the fundamental impediment to Donohoe's construction plans was (and still is) the sewer moratorium imposed upon the Friendship Heights area by the State of Maryland. This impediment was clearly beyond the control of any of the parties to this litigation." (Pet. App. 11a). Petitioner planned to build a fourteen-story building under the then-prevalent zone in Friendship Heights (C-2), was stymied by the WSSC and State-imposed sewer moratoria, and has since never sought waiver from the moratoria nor made any effort to analyze the potential fifty uses that could be made of the property under the current CBD-1 zone (prevalent throughout Friendship Heights). (App. 286). Petitioner never analyzed the feasibility of privately developing the property in accordance with CBD-1 zon-

ing; indeed, Richard Donohoe testified that an office building would be marketable in Friendship Heights be it fourteen stories or one. (App. 283-84, 287). Thus no taking by Respondents could have occurred given the moratoria and the continual ability of Petitioner to conceivably develop its property had it wished, albeit not with a fourteen-story building.

Paralleling Petitioner's private plans was the on-going, and very public, comprehensive planning process for Friendship Heights. Following Council approval of the final Sector Plan in May 1974, the Council adopted the County six-year Capital Improvements Program (CIP), the Commission adopted the Sector Plan in June, and the Council comprehensively rezoned Friendship Heights in July, mostly to the CBD-1 zone. Six months after adoption of the CIP, which listed as a project the proposed acquisition by the County of Petitioner's Parcel One for a community recreation center, Petitioner filed this lawsuit. Citing primarily to *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977), *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), and *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968), Petitioner sought to equate those cases with the facts at hand.³

The Court of Appeals correctly distinguished those cases by noting that none of those cases dealt with a sewer moratorium imposed by a non-party, autonomous governmental agency for the protection of the public health. See, *Smoke Rise, Inc. v. WSSC*, 400 F. Supp. 1369 (D. Md. 1975). Moreover, those cases generally dealt with blighting, or actual damage or destruction of im-

³Petitioner also cites (Pet. 21) to *Richmond Elks Hall Ass'n. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), which, like the above cases, dealt with a "cloud of condemnation" and a "pattern of governmental abuse" (Pet. App. 12a) that persisted for years, in which development was impossible, income generation driven off, and then, the government changed its mind as to acquisition.

provements, which is not the case here. Also, unlike here, in each, the government had created a "cloud of condemnation" and a pattern of abuse that lasted six to twelve years, making use and development of the properties impossible, and culminating in the government changing its plans to acquire. (Pet. App. 12a-13a). None of that was present in this case. In short, Petitioner's cases are simply not in point; thus, there can be no conflict between the circuits.

Only *six months* after the County expressed an intention in its financial plan (the CIP) to acquire Petitioner's property, Petitioner commenced this suit. As shown above, Petitioner never lost the rental income it had previously been earning from Parcel One, never tried to mortgage or sell Parcel One, and never sought to develop Parcel One in accordance with the CBD-1 zone. Equally distinguishable is the fact that the County in those six months never abandoned its plans to purchase (or condemn if necessary) Parcel One. Negotiations had not even commenced between the County and Petitioner, nor had public hearings been held on the individual project acquisition as required by the County Code, nor had Petitioner even requested the County to go ahead and purchase by negotiation or condemn. (App. 1234, 1238-39).

Petitioner's argument (Pet. 21-22) that the Fourth Circuit's conclusion is inconsistent with the standard used by other circuits in comprehensive land use planning cases is baldly specious. First of all, the above-discussed cases involved actual use (or abuse) of the condemnation power in urban renewal or federal statutory settings. This circuit has certainly not "rendered a decision in conflict with the decision of another court of appeals on the same matter." Rule 19, Supreme Court Rules. More importantly, certiorari should not be granted except where there exists a real and embarrassing conflict of opinion and authority between circuits. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955). None has been so demonstrated. All the Fourth Circuit has done is apply the due process clause to the facts in this case's record and reach a conclusion not in keeping with Petitioner's desires.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DURVASULA S. SASTRI
GUS BAUMAN
SANFORD E. WOOL
8787 GEORGIA AVENUE
SILVER SPRING, MARYLAND 20907

*Attorneys for Respondent
The Maryland-National Capital Park
and Planning Commission*

RICHARD S. McKERNON
ROBERT G. TOBIN, JR.
CHARLES S. RAND
MONTGOMERY COUNTY OFFICE BUILDING
ROCKVILLE, MARYLAND 20850

*Attorneys for Respondents
Montgomery County and
Montgomery County Council*

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Certificate of Service

I HEREBY CERTIFY on this twenty-first day of April, 1978, that three copies of this brief in opposition were mailed first class postage prepaid to counsel for petitioner, Warren K. Kaplan and Roy Niedermayer, 1801 K Street, N.W., Suite 1100K, Washington, D.C. 20006.

Durvasula S. Sastri (Y.B.)

DURVASULA S. SASTRI
GUS BAUMAN
SANFORD E. WOOL

*Attorneys for Respondent
The Maryland-National Capital Park
and Planning Commission*

Charles S. Rand (Y.B.)

RICHARD S. MCKERNON
ROBERT G. TOBIN, JR.
CHARLES S. RAND

*Attorneys for Respondents
Montgomery County and
Montgomery County Council*